United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 21, 2010

TO : Dorothy L. Moore-Duncan, Regional Director
Region 4

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Tri County Building Supply
Case 4-CA-37014

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by withdrawing recognition after the end of the Union's certification year based on a disaffection petition submitted to the Employer after the year ended but signed by a majority of the unit employees during the year's final week.

FACTS

On June 2, 2008, the Union was certified as the bargaining representative of a unit of the Employer's warehouse employees, yard employees, helpers, drivers, counter people, mechanics and laborers. The parties held 10 negotiating sessions from June 28, 2008 to August 6, 2009, but did not reach an agreement. On May 28, 2009,[1] employee John Carbone filed a decertification petition, and then withdrew it after the Region advised him that it was untimely because the certification year had not ended. Carbone refiled his petition on June 4 (4-RD-2162). The Region scheduled a decertification election, which was cancelled when the Union filed this blocking charge.

On August 20, Carbone gave the Employer a copy of the petition he had submitted to the Region as the showing of interest in 4-RD-2162. The petition carries the signatures of approximately 85% of the unit employees. The signatures are all dated from May 26 to May 30, i.e., during the last week of the certification year that ended June 2. On August 24, the Employer sent the Union an email advising that it was withdrawing recognition because the Union no longer represented a majority of the bargaining unit. According to Carbone, he did not show the petition to anyone in management prior to August 20. There is no

[1] All dates hereafter are in 2009, unless otherwise indicated.

evidence of Employer conduct that might have tainted the showing of employee disaffection.[2]

ACTION

We conclude that the Employer's withdrawal of recognition did not violate Section 8(a)(5) in these circumstances.

In Chelsea Industries,[3] the Employer received a disaffection petition in the tenth month of the certification year, which included signatures dating from five months into the certification year, but waited until after the certification year expired to withdraw recognition. The Board found a violation, holding that "an employer may not withdraw recognition from a union outside of the certification year based upon evidence received within the certification year."[4] The Board relied on prior cases that set out a two-pronged rationale for the certification year rule: (1) parties need an insulated period in which their bargaining relationship can develop free from the distraction that the union's support has eroded and that the employer might soon be relieved of its statutory obligations; and (2) a union needs a full year to be able to successfully bargain a first contract without being under exigent pressures to "produce hothouse results or be turned out."[5] The Board spoke in broad terms but did not specifically address the question of whether an employer could withdraw recognition based on disaffection expressed during the certification year where the petition was not submitted to the employer until after the year ended and therefore could not distract it from good faith bargaining or interfere with the union's full year of pressure-free bargaining.

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[2] The Union has filed two charges alleging bad faith bargaining, including failure to meet at reasonable times and bargaining without the intention of reaching an agreement. The Region found no merit to the first charge, and the Union withdrew it. The Region has determined that there is no merit to the second charge unless the Employer's refusal to meet after August 20th was preceded by an unlawful withdrawal of recognition.

[3] 331 NLRB 1648 (2000).

[4] 331 NLRB at 1651.

[5] 331 NLRB at 1649.

In LTD Ceramics,[6] the Board held that an employer could lawfully withdraw recognition based on a disaffection petition signed in part during the last day of the certification year and presented to the employer after the certification year. The ALJ had found that the prematurity of the signatures obtained on the last day was so slight that it was de minimis. In affirming the ALJ's decision, the Board stated that "we agree with the judge, for the reasons set forth in his decision, that the circumstances of this case are quite different from those in Chelsea Industries. . . in which the Board held that an employer could not withdraw recognition on the basis of a decertification petition signed by employees and received by the employer 5 months [sic] before the end of the certification year."[7]

Given the Board's rejection, in LTD Ceramics, of a bright line rule regarding signatures obtained during the certification year, and the factual distinctions between this case and Chelsea Industries, it is appropriate to consider the policy rationales underlying the Chelsea Industries decision in determining whether the Employer's withdrawal of recognition here was unlawful. We conclude that neither of those rationales support issuance of a complaint here. First, there could be no Employer distraction from good faith bargaining during the certification year where the Employer was not aware of the circulation of the petition, nor of the employee disaffection, until after the conclusion of the insulated period. Second, there could be no interference with the Union's right to a full year of pressure-free bargaining where the parties were engaged in active bargaining up until, and even beyond, the certification year and where the signatures on the petition were from no earlier than the last week of that year. In these circumstances, we conclude that the Employer's withdrawal of recognition was lawful.

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.

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[6] 341 NLRB 86 (2004).

[7] 341 NLRB at 88.